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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

J. HARRIS, as Trustee, etc., Plaintiff and Appellant, v. FREMONT INVESTMENT AND LOAN et al., Defendants and Respondents.	C046567 (Super. Ct. No. 00AS06819)

A dispute between siblings over their ailing father's condominium led to several claims against the property and spawned this lawsuit. Plaintiff J. Harris acquired title to the property on the eve of foreclosure. Defendants Fremont Investment and Loan (Fremont) and Jack R. and Rose M. Conn (the Conns) each held deeds of trust against the property. Harris filed suit seeking to cancel defendants' liens, alleging the deeds of trust were invalid.

The trial court initially sustained defendants' demurrers without leave to amend, and Harris appealed. In a nonpublished opinion (*Harris v. Fremont Investment and Loan* (June 19, 2002,

C038382) (*Harris I*)), we reversed, holding Harris could challenge the liens if he could satisfy the requirements of Civil Code sections 1227 and 1228.[1] A court trial followed. The trial court found Harris failed to meet the requirements of sections 1227 and 1228 and found in favor of defendants. Harris appeals, contending defendants were privy to the fraudulent loan transaction and the court erred in declining to order Fremont to produce witnesses at trial. Our review of the record reveals that substantial evidence supports the trial court's findings. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Unfortunately, one family's internal dispute has spawned two appeals over the ownership of patriarch Dr. Chaille M. Love's condominium. In 1989 Dr. Love's revocable trust held title to the condominium. A grant deed in 1999 conveyed title from the trust to Dr. Love individually (Love grant deed). At trial, Harris's questioned document examiner, James A. Blanco, testified the signature of Dr. Love on the Love grant deed is not genuine, but the signature of the notary is genuine.

The Disputed Deeds

In July 1999 Fremont loaned $100,000 to Dr. Love. The loan was secured by a deed of trust encumbering the condominium (Fremont deed). The Fremont deed was recorded on July 27, 1999. Harris admits the Fremont deed appears on its face to be in

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

proper form. However, Harris's expert, Blanco, testified Dr. Love's signature on the adjustable rate rider to the Fremont deed is not genuine.

In November 1999 the Conns loaned $72,000 to Dr. Love. The loan was secured by a second deed of trust on the condominium, executed by the borrower's daughter, Constance L. Norman, pursuant to a springing durable power of attorney.[2] Dr. Love executed the power of attorney, recorded in Idaho in November 1999 and in Sacramento in January 2001. The Conns' deed of trust (Conn deed) was recorded in Sacramento on November 19, 1999. Again, Harris admits the Conn deed "appears on its face to be in proper form."

Harris does not challenge any signature on the Conns' loan documents or on the power of attorney. Instead, Harris alleged the power of attorney was not operative because it was not timely recorded and was not accompanied by the declarations of two physicians executed under penalty of perjury. Harris argued Constance lacked authority to act as her father's agent in the loan transaction.

The Travels of Dr. Love

Dr. Love, a retired physiology professor, lived in the condominium until the late 1990's, when his health deteriorated.

In 1998 Dr. Love's sons, David and James, placed him in an assisted living facility. Dr. Love detested the facility and

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[2] Dr. Love's children will be referred to by their first names to avoid confusion.

moved back into the condominium. The incident drove a wedge between the father and at least one of his sons.

In June 1998 Constance moved her father to Utah to live with her family. Prior to the move, Dr. Love's solitary life contributed to problems with alcohol and a need for companionship. His attorney at that time testified Dr. Love was capable of making up his mind about where he wanted to live.

In June 1999 Dr. Love moved with Constance and her family from Utah to Idaho. During his Idaho sojourn, Dr. Love contracted the Fremont and Conn loans.

The Conn Loan

In November 1999 Dr. Love and his daughter decided to borrow funds in addition to the Fremont loan. Constance's niece, a mortgage broker, put her in touch with Jack Conn, a retired real estate mortgage broker and lender.

Constance told Mr. Conn her father was elderly and she held his power of attorney. She and Dr. Love had decided it was time to sell the condominium. Funds were needed to finish renovating the condominium, pay taxes, and cover Dr. Love's living expenses. Since Constance had lined up a prospective buyer, she believed they could quickly repay the loan. Constance proposed loan terms comparable to a refinance of the existing Fremont loan, because she felt refinancing would take too much time.

Before agreeing to the loan, Mr. Conn verified the information Constance provided. He also inspected the condominium to confirm its condition and the status of the renovation. Mr. Conn also interviewed the realtor handling the

condominium and the contractor performing the renovations. The realtor assessed the condo at $235,000 upon completion of the renovations and confirmed a buyer was lined up at that price. The contractor confirmed the renovation could be completed on time for $25,000.

Based on this information, Mr. Conn anticipated the loan would be repaid in two to three months but agreed to a six-month term as a precaution. He considered a loan default to be a very remote possibility.

Constance delivered her power of attorney directly to the escrow company. Mr. Conn never saw the document, relying on the escrow holder to determine its validity. Mr. Conn possessed no expertise on such documentation, since he had never previously made a loan involving a power of attorney. No one informed him of any problems with the loan documents.

The escrow company never informed Mr. Conn that Constance asked it not to record the power of attorney for family reasons. The preliminary report on the loan, which Mr. Conn reviewed, revealed no problems with title. If any major problems with the loan had occurred, Mr. Conn would not have deposited the loan funds and escrow would have been canceled.

The escrow closed and Constance signed a $72,000 note and deed of trust to the Conns as her father’s representative. With the Conns’ loan, the renovation was completed and the condominium was ready for sale.

Family Strife

In July 2000 David Love initiated a conservatorship proceeding in Idaho, alleging Constance was mismanaging their father's finances. David filed suit, seeking to cancel the Fremont and Conn deeds on the condominium. David's action was dismissed on demurrer on the ground David did not have legal capacity or standing to sue. The suit prevented the previously arranged sale of the condominium.

In November 2000 David filed suit against Constance in federal court in Sacramento, asking for an accounting and alleging embezzlement or misappropriation of funds from their father and the trust. The suit was stayed when Constance filed for bankruptcy in Utah. The brothers filed a complaint in the bankruptcy proceeding.

Dr. Love returned to Sacramento in fall of 2000. His children entered into a settlement wherein Dr. Love would reside with David for half the year and with Constance for the other half. Unfortunately, the agreement unraveled when David placed his father in a care facility.

During the tug of war over Dr. Love's care, the Fremont and Conn loans went into default. Fremont began a nonjudicial foreclosure in September 2000.

Dr. Love's mental condition over the years is disputed. In February 1999 two doctors concluded he suffered from dementia and was unable to manage daily life without help, and a third doctor made a similar diagnosis in August 1999. In contrast, James stated in a declaration: "My father is not the subject of

any pending or contemplated California conservatorship proceedings. Within the last 60 days, he has been determined by two California physicians and three different California attorneys at law to be mentally competent." Dr. Love did not testify at trial and was never deposed.

Harris's Purchase

On November 26, 2000, after returning to Sacramento, Dr. Love signed a new power of attorney naming James as his agent. That same day, James executed a "Certification of Trust" stating he was the sole acting successor trustee of his father's trust. Also on that day, James entered into an agreement to purchase foreclosure real estate (purchase agreement) with Harris. Harris agreed to pay $5,000 for the condominium, plus the legal fees incurred by the brothers. Dr. Love bore no responsibility for these fees.

James never met or spoke with Harris during the transaction. Harris's attorney dealt with James. James never consulted with Dr. Love about the terms of the sale.

The purchase agreement revealed the condo was encumbered by the Fremont and Conn loans, and that Harris was retaining counsel to bring a quiet title action against the lenders.[3] On December 5, 2000, James signed a deed to Harris as trustee of

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[3] James testified his father would be better off keeping the condominium and bringing his own suit against the lenders if he contested the loans. James urged his father to bring legal action, but he refused. James agreed Dr. Love was competent to make such legal decisions.

the Commons Trust No. 606, a single asset trust formed specifically to acquire the condominium. The deed was recorded on December 13, 2000.

Harris acquired the condominium with full knowledge of the deeds of trust. As Harris acknowledged: "The fact of the void mortgages encumbering the property was known to plaintiff at the time the property was purchased, and the purchase price so reflected."

Harris's Complaint

Harris filed suit against Fremont and the Conns, seeking to cancel the Love grant deed, the Fremont deed, and the Conn deed, in addition to other relief. Harris alleged the Love grant deed and the Fremont deed were void because Dr. Love had not signed them. Harris contended the Conn deed was void because Constance lacked a valid power of attorney. An amended complaint alleged Harris acquired title to the condominium under a deed executed by James in his capacity as attorney in fact for Dr. Love.

Subsequent Proceedings

Fremont and the Conns demurred to the amended complaint. The trial court sustained the demurrers without leave to amend, finding Harris precluded by sections 1227 and 1228 from challenging the validity of the Fremont and Conn deeds. The court found Harris had not paid value for his interest in the condominium and knew about the allegedly fraudulent deeds at the time he acquired his interest.

Harris appealed, and we found Harris's amended complaint failed to state a cause of action but leave to amend should have

been granted. We found Harris should have been allowed the opportunity to amend his complaint to allege that he paid valuable consideration for the condo and that defendants were privy to the fraud alleged.

Harris filed a second amended and supplemented complaint. A court trial followed.

At the outset, the parties agreed that in order to avoid the bar of sections 1227 and 1228, Harris must prove he paid valuable consideration and that Fremont and the Conns were privy to any alleged fraud. Harris's expert, Blanco, testified Dr. Love's signature on several documents appeared forged. However, Blanco also testified signatures can change over time, particularly with age and ill health. The genuine signatures Blanco used to authenticate Dr. Love's signature were 12 and 30 years old. Newer signatures would have been preferable. Blanco acknowledged that, assuming it was genuine, a November 2000 signature reflected significant deterioration from the last signature known to be genuine, which was from 1989.

Mr. Conn, David, James, and Harris all testified regarding their respective transactions over the condominium. At the conclusion of evidence, Fremont and the Conns moved for judgment under Code of Civil Procedure section 631.8. Following lengthy argument, the trial court granted the motions.

The trial court filed a lengthy, detailed statement of decision. The court found Harris failed to meet his burden of proof to overcome sections 1227 and 1228. Harris failed to prove he paid valuable consideration for the condominium. In

addition, Harris failed to prove the Conns or Fremont was privy to a fraud. Finally, the trial court found Harris failed to establish any fraud took place. Following entry of judgment, Harris filed a timely notice of appeal.

DISCUSSION

I

This case revolves around two sections of the Civil Code. Section 1227 states: "Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents or profits thereof."

Section 1228 states: "No instrument is to be avoided under the last section, in favor of a subsequent purchaser or encumbrancer having notice thereof at the time his purchase was made, or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended."

II

In reviewing a judgment granted in favor of the defendant after the plaintiff has completed his or her presentation of evidence in a court trial, we view the evidence most favorably to the defendant. We determine whether any competent and substantial evidence supports the judgment. The trial court's findings in granting a motion for judgment are entitled to the same respect on appeal as any other findings and are not

reversible if supported by substantial evidence. When two or more inferences can be reasonably deduced from the evidence, we are without the power to substitute our own deductions for those of the trial court. (*Kirk Corp. v. First American Title Co.* (1990) 220 Cal.App.3d 785, 806.)

As we noted in our previous opinion: "In effect, the duo of sections 1227 and 1228 operates as a form of estoppel, barring a knowing subsequent purchaser from voiding documents after the purchase in the absence of wrongdoing on the part of another party." (*Harris I*, *supra*, C038382.) We found that in order to challenge the Fremont and Conn deeds, Harris must prove he paid valuable consideration, and that defendants were privy to any alleged fraud. If Harris fails to meet either of these requirements, he may not challenge the validity of the deeds.

Therefore, our review of the trial court's judgment turns on two crucial questions: did Harris pay valuable consideration for the condominium, and were Fremont or the Conns privy to any alleged fraud in connection with their loans to Dr. Love? The trial court answered both inquiries in the negative. We must determine whether substantial evidence supports the trial court's findings.

III

The trial court found Harris failed to prove he paid valuable consideration for the condominium. The court considered the $5,000 payment called for by the purchase agreement between James and Harris. According to the court: "In the abstract, the Court finds that this sum would suffice as

valuable consideration in the sense that it was substantial as opposed to nominal or trivial under all the circumstances surrounding the December 2002 sale to plaintiff."

However, the court noted the $5,000 was paid by check to Horner & Horner, a law firm representing Harris that had previously represented James and David. Harris failed to show any attorney-client relationship between Horner & Horner and Dr. Love. As the court noted: "In addition, though the [purchase agreement] is ambiguous, there is a strong indication that Horner & Horner was actually representing [Harris] in the subject transaction, with the result that any monies received by the law firm would not constitute payment to [Dr.] Love or his trust and cannot be counted toward the consideration if any received by the seller."

The record supports the court's interpretation of the evidence. The purchase agreement provided that: "Buyer agrees to pay to seller the sum of $5,000.00 cash, net, at closing." The agreement identified Dr. Love and James, as successor trustee of the trust, as the seller. The agreement made no authorization for payment to Horner & Horner.

Harris testified he paid $5,000 in a check payable to Horner & Horner. The check contains no notation that it was being paid to the law firm in its capacity as trustee for Dr. Love. Harris produced no evidence that the $5,000 check was credited to any account that the law firm maintained for Dr. Love or the trust.

James testified he knew the $5,000 had been deposited into Dr. Love's account. However, James admitted he had never seen the check and that his knowledge was based solely on his brother David's representations. David testified he believed the $5,000 was paid directly to his father around the close of escrow. However, David admitted he never saw any evidence of such payment.

Harris did produce a check for $3,515 made payable to Dr. Love, dated January 23, 2002. The court considered this second check and observed: "The deficiency in plaintiff's evidence on this issue is not cured by the $3,515.39 check from Horner & Horner to [Dr.] Love dated January 23, 2002 [citation], because there was no satisfactory evidence linking this check to the earlier deposit of $5000 into Horner & Horner's trust account, nor any explanation, satisfactory or otherwise, of why a lesser amount was remitted to [Dr.] Love and why the check was not cut for more than a year after the sale of the condominium to plaintiff, and more than a year after this action had been commenced."

Again, the evidence supports the trial court's conclusions. Harris provided no explanation as to why the check made out to Dr. Love was in the amount of $3,515 rather than the agreed-upon purchase price of $5,000. The check was issued after the court sustained a demurrer to Harris's first amended complaint on the ground that he had failed to pay valuable consideration for the condominium. At trial, Harris remained silent as to the delay

or any connection between the second check and the condominium purchase.

Our review of the evidence supports the trial court's finding that Harris failed to prove he paid valuable consideration for the condominium. Section 1227 states that a document affecting real property, made with intent to defraud prior or subsequent purchasers, is void against "every purchaser or encumbrancer, for value." Since Harris was not a purchaser for value he cannot invoke section 1227.

IV

As we noted in our previous opinion, under sections 1227 and 1228, "[h]aving . . . admitted knowledge of the alleged void mortgages, Harris can void the deeds of trust *only* if he can establish that the beneficiaries, the Conns and Fremont, were privy to the alleged fraud." (*Harris I*, *supra*, C038382.) The trial court considered the evidence and found Harris failed to establish either party was privy to the alleged fraud.

In fact, the court found Harris failed to establish that any fraud was perpetrated against Dr. Love in connection with the Fremont and Conn loans. After weighing the evidence, the court found no evidence that Dr. Love had any objections to or disagreements with the loans. The court further found no evidence that Dr. Love did not receive the loan proceeds or did not authorize his daughter to engage in the loans on his behalf.

The evidence supports the court's conclusion. Dr. Love did not testify. His son James testified that Dr. Love never complained about either the loans or Constance's participation

in the process. In fact, although James urged his father to sue Constance, Dr. Love repeatedly refused.

The court proceeded to consider whether Fremont or the Conns were privy to any fraud intended by Constance but not proven. The court noted "privy to fraud" is not defined by section 1228 and concluded a plaintiff must establish that the defendants either knew or had a strong suspicion amounting to a belief that a fraud was being perpetrated. As the court observed: "One cannot unwittingly become privy to an alleged fraud by accident or negligence."

We agree with this interpretation of the statute, which is not disputed by either side.

The Conn Loan

As to the Conn loan, the court found Mr. Conn ascertained the loan funds were to be used for improvement of the condominium to facilitate a sale. The court found no evidence Mr. Conn knew of the alleged defect in Constance's power of attorney or that he even saw the document. Nor did the evidence reveal Mr. Conn knew Constance requested the document not be recorded prior to the close of escrow. The court noted Mrs. Conn had no active involvement in the transaction and could not have independently acquired any knowledge of the alleged defect.

The record completely supports the court's findings. Mr. Conn testified as to his efforts to ascertain that loan proceeds would be used for their intended purpose and that they were used to improve the property for sale. Mr. Conn further

testified he relied on the title company to determine the validity of the documentation, including the power of attorney. Mr. Conn had no communication with Dr. Love. He was not involved in any discussions regarding the power of attorney.

The court found no evidence that the Conns paid a "kickback," commission, or any remuneration to Constance on the transaction. Again, the record supports the court's conclusion.

In addition, the court found no agent of the Conns knew or believed that a fraud was being perpetrated against Dr. Love. No one connected with the title company or any other possible agent of the Conns believed or suspected that Dr. Love had not signed the Love deed or that the power of attorney was not valid.

The record supports this conclusion. Harris's own document expert testified he could not determine a signature's authenticity without a microscope and other instruments. In addition, the expert noted signatures change over time and are impacted by age and infirmity. Such testimony precludes a finding that escrow agents routinely inspecting documents have the ability or expertise to detect any irregularities in the authenticity of a signature.

The court correctly concluded: "There is no satisfactory evidence that the Conns or their escrow agent ever became aware of any facts or circumstances that would have caused a reasonable person to suspect that [Dr.] Love had not signed the Love Grant Deed or that a fraud was being perpetrated against [Dr.] Love in connection with the Conn loan transaction."

The Fremont Loan

As to the Fremont loan, the court found no credible evidence that any director, officer, or employee of Fremont knew, believed, or suspected that Dr. Love had not signed the Fremont deed or that any fraud was being perpetrated against him in connection with the loan.

At trial, Harris posited two facts that allegedly should have alerted Fremont to fraud. First, Fremont's agent, Chicago Title, possessed documents showing the discrepancy between genuine signatures of Dr. Love and the signatures on the Love grant deed and the Fremont deed. Second, because the loan to Dr. Love was to be secured by an owner-occupied dwelling, a notation on an appraisal report that the condominium was vacant gave Fremont actual knowledge that something was amiss in the transaction.

The court considered and rejected both claims. The court found it could not discern any discrepancy between Dr. Love's signature on the 1989 deed of trust and the disputed signature on the Love grant deed. The court found the evidence shows there was not such an apparent or noticeable discrepancy that a reasonable person examining the genuine signatures and the allegedly forged signatures would be caused to suspect that Dr. Love did not sign the Love grant deed, the Fremont deed, or other documents submitted to Fremont. The court further found no evidence anyone connected with Fremont ever actually compared the signatures cited by Harris.

Our review of the record reveals no evidence any employee of Fremont or Chicago Title ever compared the signature on the 1989 deed with the disputed signature on the Fremont deed.

Moreover, Harris's own handwriting expert testified as to the difficulties in assessing authenticity. Blanco testified that a signature can change over 10 years. Medical problems contribute to handwriting deterioration. Photocopies obscure detail and make authentication more problematic. Blanco testified that in assessing the authenticity of Dr. Love's signature on a document, he could not make an accurate determination absent a microscope.

With regard to the "vacant" notation on the appraisal form, the court found "nothing about the condominium being vacant at the time of the appraisal that would have caused a reasonable person to conclude, believe or suspect . . . that the loan application was false or fraudulent in some respect." Nor did the court find any evidence anyone connected with Fremont actually noticed, learned about, or otherwise knew of the alleged inconsistency between the application for a loan secured by an "owner-occupied" dwelling and the notation on the appraisal report that the condo was vacant.

Again, we agree. Harris presented no evidence that even if Fremont had noticed the inconsistency, it would have been alerted to any alleged forgery.

Ultimately, the court concluded: "With respect to both loans, there is no evidence that either Fremont or Conn was aware that Constance Love Norman was attempting to defraud

Chaille M. Love –- even assuming that Mrs. Norman had such intent, which was not proven. Likewise, there is no evidence that either defendant was aware of facts that would have put a reasonable person on notice that Mrs. Norman might be attempting to defraud her father."

Ultimately, we agree.

V

Finally, Harris argues the trial court improperly declined to order Fremont to produce knowledgeable witnesses prior to trial. Harris served Fremont with a notice pursuant to Code of Civil Procedure section 1987 "to designate one or more persons to testify on your behalf" and to produce those persons to appear and testify on the first day of trial.

The Code of Civil Procedure section 1987 notice also stated: "The matters on which your representative(s) will be examined pertain to the loan made by you on 606 Commons Drive . . . , which is the subject of this lawsuit, including but not limited to all matters pertaining to the loan application, title insurance process, investigation of the property and borrower at any stage, underwriting of the loan, appraisal of the property, funding of the loan and verifications obtained."

Fremont failed to produce anyone to testify in response to the notice. During trial, the court entertained extensive argument on the issue. The court denied Harris's motion to compel witnesses.

Code of Civil Procedure section 1987, subdivision (b) provides, in pertinent part: "In the case of the production of a party to the record of any civil action . . . or of anyone who is an officer, director, or managing agent of any such party . . . , the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend before a court, or at a trial of an issue therein, . . . is served upon the attorney of that party . . . ."

In denying the motion, the court considered the language of Code of Civil Procedure section 1987. The court noted section 1987 provides a mechanism for the presentation of witnesses, but specifies "an officer, director or managing agent." The court found section 1987 "seems to imply a more specific designation of a person, either an officer, director or a managing agent, and not a vague reference to any person who is selected by the receiving party to be able to testify about a particular subject."

The court also noted it had previously asked Harris for a presentation of the evidence that would be addressed by this testimony. The court found it was unclear that the witness would testify to anything in particular that would be helpful to Harris's case. As such, "that creates a little bit more of a situation that it tends to be more in terms of discovery than in terms of actually presenting a witness to testify about something relevant in the case."

The court also found an alternate means available for Harris to procure such testimony in "[Code of Civil Procedure

section] 2025(3)(d) [*sic*]."[4] Finally, the court found, under Evidence Code section 352, Harris's request would require an undue consumption of time given the potential probative value that might be attained from the testimony.

We agree with the trial court that Code of Civil Procedure section 1987 contemplates the production of named individuals for testimony at trial. It is a substitute for the more cumbersome process of subpoena, limited to prescribed categories of potential witnesses. Thus, if a party wishes to ensure the availability at trial of a person who is a party of record or an officer, director, or managing agent of a party, a simple written notice requesting the person's attendance, directed to the party's attorney, will suffice for that purpose. Section 1987 is not a discovery tool that obligates a party to self-identify persons with relevant information and produce them at trial for interrogation. Harris's notice therefore was defective and the trial court properly declined to compel the production of unnamed witnesses.[5]

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[4] Code of Civil Procedure section 2025, subdivision (d)(6) states in part: "If the deponent named is not a natural person, the deposition notice shall describe with reasonable particularity the matters on which examination is requested. In that event, the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent."

[5] Harris also summarily contends the trial court erred in denying his motion for an order continuing trial and reopening discovery in order to identify and depose Fremont employees

DISPOSITION

The judgment is affirmed. Fremont and the Conns shall recover costs on appeal.

RAYE, Acting P.J.

We concur:

MORRISON, J.

ROBIE, J.

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involved in processing the loan. However, in denying the motion, the trial court indicated Harris could renew the motion based on further developments at trial. Harris never renewed his motion. The denial of a continuance to permit discovery is a matter committed to the trial court's discretion. We will not disturb that discretion absent a clear showing of abuse. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1173.) Harris has failed to make such a showing.